Not Guilty! Making It Happen with Cutting-Edge Defense

FORFEITURE

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Contents

Introduction 1

CAFRA 5

Forfeiture *in Rem* and *in Personam* 6

The Seizure 7

Venue 11

Administrative v. Civil v. Criminal Forfeitures 13

- Administrative forfeiture 13
- Civil Forfeiture 15
  - *Complaint* 16
  - *Claims* 18
  - *Burden of proof* 21
  - *Nexus* 23
- Criminal Forfeiture 24
  - *Rebuttable presumption* 24
  - *Restraining orders* 25
  - *Pleas* 26
  - *Remission and Mitigation* 26
  - *Ancillary Hearing* 27

Defense Motions 28

- Motion for appointment of counsel 28
- Motion for return of property 29
- Hardship 30
- Motion to dismiss 31
  - *Rule 12(b)* 31
  - *Statute of limitations* 33
  - *Innocent Owner Defense* 35

Standing 36

Statutory....................36
Jurisdictional standing....................39
Classification of Claimant....................41
Fugitive Disentitlement....................41
Conclusion....................42

Introduction

Many believe that forfeiture originated in biblical times. "If an ox gore a man or woman that they die; then the ox shall be surely stoned and its flesh not be eaten; but the owner of the ox shall be quit."[1] However, more verifiable accounts from early England and the colonies describe the civil death of the crown's subjects, use of their property by the offended Lord for a year and final escheat of the property to the Lord or Crown.[2] This occurred because most offenses were punishable by death and there was no owner to whom the property could be returned. Of course, no man actually owned his property at the time[3], so escheat to the crown was not such a surprising result. It would be interesting to see if this is the genesis for the current "relation back" doctrine, in which the government's title to property is deemed to relate back to the time that the property becomes forfeitable. *United States v. A Parcel of Land, Buildings, Appurtenances and Improvements, Known as 92 Buena Vista Avenue,* 507 U.S. 111, 132 (1993)[relation back is the retroactive vesting of title in the government upon entry of the order of forfeiture back to the time when the offense was committed].

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[1] Exodus 21:28; Fishburn, Gored By The Ox: A Discussion Of The Federal And Texas Laws That Empower Civil-Asset Forfeiture (http://www.lawrecord.com/oldsite-pre20050412/articles/vol26/26rlr4/fishburn.htm).

[2] It is interesting that the victim of the offense received nothing.

[3] Greek, Cecil, *Drug Control And Asset Seizures: A Review Of The History Of Forfeiture In England And Colonial America*, available at http://www.fsu.edu/~crimdo/forfeiture.html [originally published in Mieczkowski, Thomas (ed.) pages 109-137 *Drugs, crime and social policy,* (Boston: Allyn and Bacon)].

The colonies ultimately rejected the draconian forfeiture laws by 1787.[4] It was not until the 1970's and the ill fated "war on drugs" that the United States turned to forfeiture once again.

Forfeiture in the United States is based upon the old deodand premise for forfeiture; the thing committed the wrong and must be punished.[5] A strange anachronism, since this practice was based upon the belief that an evil spirit continued to exist in the thing that might cause future harm if it was not destroyed. The government originally used forfeiture to obtain ownership of the vessels that were engaged in piracy, slave trading, and smuggling. *See*: *e.g., The Palmyra*, 12 Wheat. 1, 6 L.Ed. 531 (1827); *Harmony v. U.S.*, 2 How. 210, 11 L.Ed. 239 (1844); *Tryphenia v. Harrison*, 24 F. Cas. 252 (CC Pa. 1806); *C.J. Hendry v. Moore*, 318 U.S. 133, 145-148 (1943)(collecting cases). The underlying justification for forfeiture was articulated by Justice Story when he said, "[t]he vessel which commits the transgression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner." *U.S. v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844). Today, most forfeiture is pursued in the context of a drug offense.

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[4] Forfeiture fell to disuse primarily because the motive for forfeiting property to the crown was not strong among colonial governments. Greek, Cecil *Drug Control And Asset Seizures: A Review Of The History Of Forfeiture In England And Colonial America* (http://www.fsu.edu/~crimdo/forfeiture.html) [originally published in Mieczkowski, Thomas (ed.) pages 109-137 *Drugs, crime and social policy,* (Boston: Allyn and Bacon)].
[5] See Footnote 3.

Another modern development in forfeiture law has been recognition of an innocent owner defense. However, this mitigating feature has not been incorporated in the forfeiture laws in every jurisdiction. The case in point is *Bennis v. Michigan,* 516 U.S. 442 (1996), in which a husband used the family car to obtain the services of a lady of ill repute. The wife's complaint that she did not know about her husband's activities did not save her interest in the car since the forfeiture was advanced under a nuisance law which contained no innocent owner defense.

Prior to 1984, all property or funds forfeited to the United States government were deposited into the general treasury, however this changed. In 1984, Congress earmarked all funds and property forfeited to be deposited into a special fund that was to be used exclusively for law enforcement purposes.[6] 28 U.S.C. 524(c). Since the federal government was allowed to share its revenue with state and local law enforcement, it quickly found allies to increase the newfound revenue stream. It wasn't long before state legislatures were willing to expand forfeiture procedures in order, at least in part, to supplement their own law enforcement budgets. As

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[6] Keep in mind, however that informants may obtain a portion of these funds and the government often enters into sharing agreements with law enforcement from other jurisdictions. For details as to how the federal government shares seized funds and property, see *The Department of Treasury Guide to Equitable Sharing for Foreign Countries, and Federal, State, Local Law Enforcement Agencies*, April 2004, available at http://www.ustreas.gov/offices/enforcement/teoaf/guidelines/greenbook.pdf.

may have been expected; abuse, corruption and injustice followed.[7] Prior to reforms to the federal forfeiture laws, the Drug Policy Foundation issued a report which began with the following observations.

> "The legal principle underlying civil asset forfeiture—that property can be guilty of wrong-doing and seized as punishment—has its ancient origins in the Bible and the "deodand." Under English common law, a deodand (Latin for "given to God") was a thing that was forfeited to the Crown for the good of the community. If a person fell off a horse and was killed, then the horse or its value would be forfeited as a deodand to the Crown. The law of deodands was extended to English admiralty and customs laws to seize vessels and cargo—a power so abused by the English Crown that it helped spark the American Revolution. Because of these abuses, the founding fathers included the Due Process Clause of the Fifth Amendment in the Constitution to ensure that property not be taken from citizens without a judicial hearing. Unfortunately, this practice continues today. Congress passed the first drug-related civil asset forfeiture law as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970. The forfeiture provision, 21 USC § 881, authorized the government to seize and forfeit illicit drugs, manufacturing and storage equipment, and conveyances used to transport drugs. In 1978 and throughout the 1980s, Congress passed a number of "anti-drug" laws that expanded the government's power to seize and forfeit property. Ostensibly aimed at attacking the proceeds of illicit drug traffickers, civil asset forfeiture has become a corrupting cash cow for law enforcement, and a serious threat to Americans' constitutional rights. What was once a means to an end, has become an end in itself." Policy Briefing, Forfeiture, (The Drug Policy Foundation 1999) [www.drugpolicy.org/docUploads/Asset_Forfeiture_Briefing.pdf].

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[7] For some of the more egregious abuses, see *Hooked on the Drug War*, St. Louis Post-Dispatch, April 28 – May 5, 1991; Oct 6-11, 20, 1991; and *Tainted Cash or Easy Money*, Orlando Sentinel, June 14, 1992, at A-1.

CAFRA

As a result of the public outcry and NACDL's work highlighting these abuses in testimony before Congress, Rep. Henry Hyde led the effort in Congress to reform the federal forfeiture laws. Past NACDL President Bo Edwards labored a decade with the Legislative Committee to achieve the passage of the Civil Asset Forfeiture Reform Act of 2000 (CAFRA). Despite protest from the law enforcement community and the Department of Justice, CAFRA was passed and signed into law. While not correcting all the problems it has been ameliorative.

Among the most significant changes CAFRA made to forfeiture law are the waiver of a cost bond in all cases except administrative forfeiture, allowance for a court appointed attorney to represent a claimant, shifting the burden of proof from the claimant to the government, and limiting the availability of warrantless seizures. CAFRA also consolidated forfeiture laws.

Unfortunately not all states have followed suit to reform their own forfeiture laws. Texas places the burden of proof on the State to show by a preponderance of evidence that property is subject to forfeiture. An affirmative defense exists for spouses who, because of family violence, are unable to prevent an act giving rise to a forfeiture. Article 59.05(b) and (c), Texas Code of Criminal Procedure. And the case is governed by the rules of pleading and procedure for civil cases. Most importantly, the State must commence judicial forfeiture within 30 days of the

seizure. Article 59.04, Texas Code of Criminal Procedure. Property may be released to the owner or interest holder who secures the value of the property with a bond who also agrees to return the property to the State when the forfeiture hearing begins and agrees to abide by the court's decision in the matter. Article 59.02(b), Texas Code of Criminal Procedure. Texas law also provides for an innocent owner defense which must be proven by the claimant by a preponderance of the evidence. Article 59.20(c), Texas Code of Criminal Procedure. Additionally, Texas forfeiture law has been expanded to apply to any first or second degree felony in the Texas Penal Code as well as numerous expressly listed offenses contained in other codes. *See*: Article 59.01, Texas Code of Criminal Procedure.

On the federal level, prior to CAFRA, there were hundreds of federal forfeiture provisions. While forfeiture is still available in cases involving such crimes as diverse as drug offenses, gambling, obscenity, copyright infringement, identity theft, and healthcare fraud, today forfeiture is consolidated into a few general provisions.

Forfeiture *in Rem* and *in Personam*

Courts can have either *in rem* on *in personam* jurisdiction in forfeiture proceedings. *In rem* jurisdiction involves defendant "property" while *in personam* jurisdiction is against an individual. Also, the object sought to be forfeited is not

the property *per se* but, rather the defendant's interest in the property. The theory behind *in rem* proceedings is the legal fiction that it is the property itself that is guilty and the court, having jurisdiction over the property, will decide who has superior title between the government and the claimant. Generally, criminal forfeitures are *in personam,* while all civil forfeitures are *in rem*.

The Seizure

Valid seizure of the *res*[8] is a prerequisite to initiation of a forfeiture proceeding. *See U.S. v. One Assortment of 89 Firearms*, 465 U.S. 354, 363, 104 S.Ct. 1099, 1105, 79 L.Ed.2d 361 (1984); *Taylor v. Carryl*, 61 U.S. (20How.) 583, 599, 15 L.Ed. 1028 (1858); *Republic National Bank of Miami v. U.S.*, 506 U.S. 80, 84, 113 S.Ct. 554, 557, 121 L.Ed.2d 474 (1992). Even in those situations in which a seizure warrant is issued, there is generally no pre-seizure notice provided to the owner. The Supreme Court has held that pre-seizure notice is not required in order to satisfy due process requirements. *Fuentes v. Shevil*, 704 U.S. 67, 90 (1972); *see also*: *U.S. v. James Daniel Good Real Property*, 510 U.S. 43(1993).

In order for a magistrate to issue a seizure warrant, the government must show probable cause that the property is subject to forfeiture. However, the property can be seized without a warrant if (1) a complaint for forfeiture has been filed and an arrest warrant *in rem* has been issued; or (2) the property was lawfully

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[8] *Res*, in this context, is defined as "an object, interest, or status, as opposed to a person." *Black's Law Dictionary*, *8th Ed.* West, 2004.

seized by a state or local law enforcement agency and is turned over to a federal agency, or (3) probable cause exists to believe that the property is subject to forfeiture and (a) the seizure is pursuant to a lawful arrest or search, or (b) an exception to the Fourth Amendment warrant requirement applies.[9]

If the property sought to be forfeited is located outside the United States and is seized by a foreign government, the United States must show that the foreign authority seized the property in order to cooperate with the United States before it establishes that the court has *in rem* jurisdiction. 28 U.S. § 1355(b)(2); *U.S. v. All Funds in Acct. Numbers*, 295 F.3d 23,24 (2nd Cir. 2002). Additionally, the government must show that the foreign government will likely follow an order of a U.S. court if it is presented with a forfeiture order. See: *U.S. v. All Funds in Account (United Arab Emirates)*, 167 F.Supp.2d 707, 711-712 (D. N.J. 2001). The latter can be shown by past compliance with U.S. forfeiture orders. 28 U.S.C. §1355(b)(2) states, "[w]henever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action

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[9] Texas provides that property may be seized without a warrant in four circumstances: If "(1) The owner, operator, or agent in charge of the property knowingly consents; (2) the seizure is incident to a search to which the owner, operator, or agent in charge of the property knowingly consents; (3) the property subject to seizure has been the subject of a prior judgment in favor of the state in a forfeiture proceeding under this chapter; or (4) the seizure was incident to a lawful arrest, lawful search or lawful search incident to arrest." Article 59.03, Texas Code of Criminal Procedure.

or proceeding for forfeiture may be brought as provided in paragraph (1),[10] or in the United States District Court for the District of Columbia." *See also*: *U.S. v. All Funds in Acct. Numbers*, 295 F.3d 23, 24 (2nd Cir. 2002)[government must demonstrate cooperation]; *U.S. v. All Funds (Meza)*, 856 F. Supp. 759 (E.D.N.Y. 1994)[*in rem* jurisdiction over property in a foreign country exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property]; *U.S. v. Contents of Account (United Arab Emirates)*, 167 F.Supp.2d 707, 711-12 (D. N.J. 2001)[*in rem* jurisdiction depends on actual or constructive possession of res rendering enforcement of forfeiture order likely].

In *U.S. v. All Funds in Account (United Arab Emirates)*, 167 F.Supp.2d 707, 711-712 (D. N.J 2001), the court stated that funds frozen pursuant to a treaty request could be reached. The forfeiture order of a U.S. court would likely be enforced because an official of the government informed the U.S. that if it were presented with a forfeiture order from an American Court, the funds in the accounts would be forfeited. If the Government does not allege that the *res* was seized pursuant to a U.S. request or that the foreign government official has agreed

[10] 28 U.S.C. § 1355(b)(1)states: A forfeiture action or proceeding may be brought in (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in Section 1395 of this title or any other statute.

to enforce a U.S. forfeiture, inquire further to determine if the property is actually seized.

For example, Mexico has never agreed to deliver property to the United States in response to a forfeiture order of a court in the United States. However, Mexico may place the property in *Aseguramiento*. This is *not* a seizure but a protective order of sorts; a provisional secure order. Thus, the *res* is not within the court's jurisdiction in such a case.

> "*In rem* jurisdiction over property in a foreign country exists if there is a seizure of the property that gives the court constructive control over the property, and if the seizure satisfies the traditional concerns of jurisdiction, namely enforceability of the judgment and reasonable probability of notice to the parties interested in the property." *U.S. v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro*, 856 F. Supp. 759, 762 (E.D.N.Y. 1994) *aff'd*. 63 F.3d 148 (2nd Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996)[emphasis added].

In *De Castro*, *supra*, it was crucial to the jurisdiction of the federal district court, that the English court gave assurance that it would enforce the United States Court's judgment.

> "Seizure of the account in Great Britain with the assistance of the British government gave this court constructive control over the defendant funds. The opinion of the English High Court gave assurance that a judgment of forfeiture given by this court would be enforced in England." *U.S. v. All Funds on Deposit in Any Accounts Maintained in Names of Meza or De Castro*, 856 F. Supp. 759, 763 (E.D.N.Y. 1994) *aff'd*. 63 F.3d 148, 151 (2nd Cir. 1995).

Venue

Forfeiture must also be brought in the proper venue. If it is not, the complaint is subject to a motion to dismiss. Venue for civil forfeiture is: (1) Where the defendant is found if charged with a criminal violation, *See*: 18 U.S.C. §981(h); (2) where the defendant is prosecuted if charged with a criminal violation, *See*: 18 U.S.C. §981(h); (3) the district where any acts or omissions giving rise to the forfeiture occurred, *See*: 28 U.S.C. §1355; (4) the District of Columbia when property subject to forfeiture is located outside the U.S., *See*: 28 U.S.C. §1355; (5) the district where the penalty accrues or the defendant is found, *See*: 28 U.S.C. §1395; (6) any district where the property is found, *See*: 28 U.S.C. §1395; or (7) any district where the property is brought if brought from outside that district, *See*: 28 U.S.C. §1395.

If the property is seized outside the United States, 28 U.S.C. §1395(c) provides that forfeiture, "may be prosecuted in any district where the property is brought." Section 1395(c) applies only to property seized outside the territorial limits of the United States. *See U.S. v. $633,021.67 in U.S. Currency*, 842 F. Supp. 528 (S.D.N.Y 1993).

Note that this "where the property is brought" provision would allow the government to forum shop for the jurisdiction with the best law given a particular set of facts. While many claimants have attempted to complain about this abuse,

these authors have been unable to locate a single case in which a litigant was successful in defeating the government's choice of forum where the property was brought.

In a criminal forfeiture proceeding, 28 U.S.C. § 1355(b) provides that a forfeiture action should be brought in a district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred or any other district where venue is specifically provided. One might presume that this means the location where the criminal offense occurred upon which the forfeiture is based. However, courts have held that the place where the property was delivered may serve as a proper venue under the "act giving rise to the forfeiture" provision. Nevertheless, the argument should be made that the phrase "acts or omissions" refers to the "specified unlawful activity" performed which comprises the alleged criminal offenses allowing for civil forfeiture. *See*: *U.S. v. All Funds on Deposit in any Accounts Maintained in the Names of Meza or Castro,* 856 F.Supp. 759, 763 (E.D. N.Y. 1994)

As a caveat, make certain that the law in the venue where you would seek to move the case is more favorable, or at least the same, as the place where the case is currently located. For example, Ninth Circuit law on tracing the proceeds of some form of illegal activity is far superior to the law on tracing in the Fifth or DC Circuits.

Administrative v. Civil v. Criminal Forfeitures

Administrative Forfeiture

Administrative forfeiture can be brought via customs laws or under other forfeiture provisions. If the forfeiture action is brought under customs laws, there are certain provisions that are peculiar. These provisions were unaffected by CAFRA and are rare and unusual enough to leave for more thorough treatment elsewhere. Be forewarned, however, that bond must be posted in such cases in order to preserve a claim and that the deadlines for claims are substantially tighter than for other forfeitures.

For all administrative forfeiture actions not brought under customs laws, CAFRA provisions apply.

Administrative forfeiture is only available on property that (1) does not exceed $500,000 in value; (2) has been illegally imported into the country; or (3) is a conveyance used in controlled substances or monetary instrument offenses. Beware that under categories two and three the property may exceed $500,000 in value. Therefore, make no assumptions that an administrative forfeiture is not permitted if there is even a remote possibility that the property has been illegally imported or is involved in a drug or money laundering offense. If a claim must be

filed to halt such an administrative forfeiture, err on the side of caution and file the claim.

The government must provide notice of seizure to all persons with an interest in the property and publication of the seizure is required weekly for three weeks in the event that the government is unaware of the identity of all interest holders.[11] If the interest holder is known, the government must provide the person or entity with actual notice. Within 30 days from the last publication date, a claimant seeking return of the property must file his or her claim.[12] If a claim is filed, the administrative proceeding is terminated and the matter is referred to the U.S. Attorney's office for judicial forfeiture.

Additionally, the government must send notice to interested parties within 60 days of the seizure, unless the proceeding is an adopted forfeiture,[13] in which case the deadline is 90 days. 18 U.S.C. § 983(a)(1)(A). The government can seek extension of this deadline by an additional 30 days by request or 60 days by court order. 18 U.S.C. § 983(a)(1)(B) and (C). If the government fails to provide timely notice, the property must ostensibly be returned. However this is done without prejudice and the government is free to attempt to forfeit the property at a

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[11] Actual notice is required for persons or entities that the government knew or should have known had an interest in the seized property.
[12] Rule G (5)(a)(ii)(B) of the Supplemental Rules for Admiralty or Maritime Claims. (Supp.Rules).
[13] An "adopted forfeiture" is a forfeiture proceeding which originated by another jurisdiction which has been "adopted" by the federal government. *See*: *supra* footnote 1.

subsequent time. 18 U.S.C. § 983(a)(1)(F). Oftentimes this is done without the property ever being returned.

Upon receiving notice of the proceeding, the claimant must file a claim within 35 days after the *mailing* of the notice, or within 30 days of the final publication of the notice if the notice letter is not received. 18 U.S.C. § 983(a)(2)(B). Upon filing of the claim, the government has 90 days in which to respond by filing a complaint for forfeiture in compliance with the Supplemental Rules for Certain Admiralty and Maritime Claims or return the property pending the filing of a complaint. 18 U.S.C. § 983(a)(3). At this time, the government can opt out of the administrative or civil forfeiture process and file a criminal indictment alleging that the property is subject to forfeiture, thus removing the case into the criminal forfeiture arena. 18 U.S.C. § 981(d); 18 U.S.C. § 983(a)(3). If the government fails to meet its deadline, and no criminal indictment is issued, the property must be returned. 18 U.S.C. § 983(a)(3). Another major difference between administrative forfeiture under customs laws and under CAFRA is that under the latter, the requirement for bond is waived. 18 U.S.C. § 983(a)(2).

<u>Civil Forfeiture</u>

Generally judicial forfeitures are required when the value of the property exceeds $500,000, other than conveyances or monetary instruments involved in drug offenses or money laundering. *See*: 18 U.S.C. § 1607 and 19 U.S.C. § 985(a).

Additionally, when a party chooses to contest administrative forfeiture proceedings, they become judicial proceedings. Any proceeding for forfeiture *in rem* arising from a federal statute is governed by the Supplemental Rules for Certain Admiralty and Maritime Claims (hereinafter "Supplemental Rules" and cited as Supp.R.). Supp.R. G(1).

Complaint

As mentioned above, because these proceedings are governed by the Supplemental Rules, the complaint is subject to Supplemental Rule G(2) and must: (1) be verified; (2) state the grounds for subject matter jurisdiction, *in rem* jurisdiction over the property, and venue; (3) describe the property with particularity; (4) state the location where the seizure occurred and its current location, if the property is tangible; (5) state the statute under which the forfeiture is brought; and (6) state sufficiently detailed facts to show a reasonable belief that the government will be able to meet its burden of proof at trial. Supp.R. G(2). It should be noted that the government need not have sufficient evidence to forfeit the property at the time of filing the complaint. 18 U.S.C. § 983(a)(3)(D).

Supplemental Admiralty and Maritime Claims Rule C(2) and E(2)(a) are made applicable to forfeiture proceedings pursuant to 18 U.S.C. § 981(d), require that the government's complaint contain sufficient facts to enable claimants to commence an investigation of the facts and to respond with some degree of

particularity. *See*: *U.S. v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987). The courts do not look at the knowledge that the claimants may or may not have to determine the sufficiency of the complaint, they look instead at the face of the complaint itself. *U.S. v. Pole No 3172, Hopkinton*, 852 F.2d 636, 639-641 (1st Cir. 1988). In *U.S. v. 39,000 in Canadian Currency,* 801 F.2d 1210 (10 Cir. 1986), the Tenth Circuit upheld the trial court's dismissal of a complaint which did not allege a specific date, location, amount or participants in an alleged exchange of drugs for cash.

When fashioning a motion to dismiss the complaint, take the facts pled in the complaint as true only for purposes of performing the appropriate legal analysis. *See*: *U.S. v. One 1997 Mercedes E4201,* 175 F.3d 1129, 1131 n.1 (9th Cir. 1999), *distinguished on other grounds*; *U.S. v. One 1992 Ford Mustang GT VIN 1FACP42E5NF134795,* 73 F.Supp.2d 1131 (C.D. Cal. 1999). The remedy for a complaint that does not state a claim upon which relief can be granted is dismissal and amendment of the complaint, not use of discovery to determine the missing pieces in the allegations. *Kempe v. Monitor Intermediaries, Inc.,* 785 F.2d 1443, 1444 (9th Cir. 1986). The district court should not be drawn outside the four corners of the complaint in deciding a motion to dismiss. *U.S. v. All Right, Title and Interest in Five Parcels,* 830 F.Supp.750, 756 (S.D. N.Y. 1993). If the court decides to consider matters outside of the complaint, the motion to dismiss should

be converted to a motion for summary judgment. *U.S. v. 105, 800 Shares of Common Stock*, 830 F.Supp. 1101, 1124 (N.D. Ill. 1993).

> "Leicher also appears to be arguing that if FirstRock did not know of any fraudulent activity concerning Leichter and Pierce, it should have. Specifically, Leichter asserts FirstRock had a duty to make further inquiries because of the Leichter's listed status as Pierce's trustee. However, what FirstRock knew or should have known regarding any risk of loss is a question of fact and inappropriate for this court to determine on a Rule 12 (b)(6) motion." *U.S. v. 105,800 shares of Common Stock,* 830 F. Supp. 1101, 1124 (N.D. Ill. 1993).

Also, the fact that a court issues a seizure warrant based upon the complaint is an unrelated question to whether the complaint sufficiently pleads facts satisfying the particularity requirement of the Supplemental Rules for Admiralty. *See*: *U.S. v. Funds in the Amount of $9,800,* 952 F.Supp. 1254, 1259-1260 (N.D. Ill. 1996). The government must allege in the complaint that the elements of the offense giving rise to the forfeiture exist. *See e.g. U.S. v. 105,800 Shares of Common Stock*, 830 F.Supp. 1101, 1123 (N.D. Ill. 1993). As with any motion to dismiss for failure to state an offense, counsel should determine whether the government has plead every element of an offense sufficiently.

Claims

A party seeking the return of property must contest the forfeiture by filing a claim in which the party identifies the specific property claimed, identifies the claimant and their interest, and is signed under penalty of perjury. Supp.R.

G(5)(a). Beware that general creditors do not have a legal interest in seized property to have standing to make a claim. *United States v. Schwinner,* 968 F.2d 1570, 1581 (2nd Cir. 1992); *United States v. $61,483.00 in U.S. Currency*, 2003 WL 1566553 (W.D. Tex. Deb. 18, 2003). *See also*: 18 U.S.C. § 983 (d)(6)(B)(i), (ii) & (iii)[no standing for general creditor, bailee if bailor unknown, or nominee who exercises no dominion or control].

If the claimant received notice, the claim must be filed no later than the deadline stated on the notice (must be at least 35 days after notice is sent). Supp.R. G(4)(b)(ii). If the claimant did not receive notice, but it was published, the claim is due within 30 days after final publication of the legal notice in a publication of general circulation or 60 days after first publication on an official government forfeiture website. Supp.R. G(5)(a)(ii)(B). If the claimant did not receive notice and there was no publication of the service, and if the property was in the possession of the government at the time a complaint was filed, the claim must be filed within 60 days of the filing of the complaint. Supp.R. G(5)(a)(ii)(B). If a claim is not filed within the timeframe required, the government can seek a default judgment against all parties who did not respond. Fed.R.Civ.Pro. 55(b). If a claimant has a default judgment entered against him, it is very difficult, and highly unlikely, to set it aside. There are two avenues by which a claimant can seek this

relief, Rules 55(c)[14] and 60(b).[15] Keep in mind that relief under either of these avenues will be strictly at the discretion of the court. Unfortunately, as will be discussed, the converse is not true, and the government will, in nearly all instances, be able to pursue forfeiture, in one form or another, regardless of its failure to comply with the applicable rules or statutes.

The filing of a claim does not alleviate the claimant's duty to file an answer to the complaint. This answer is due within 20 days after the filing of the claim and will waive any objection to *in rem* jurisdiction or venue if the claimant does not file the appropriate motion or include such objection in the answer. Supp.R. G(5)(b). Make certain to include any counter or cross claims in the complaint and assert any defenses. An answer is not due within 20 days of filing a claim if first the claimant chooses to file a motion to dismiss the complaint. In such a case, the answer is due 20 days after such a motion is denied.

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[14] Rule 55(c) states "[t]he court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."

[15] Rule 60(b) states: "On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. It is important to note that a motion under Rule 60(b) must be made within a reasonable time, and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding. Fed.R.Civ.Pro. 60(c).

Burden of proof

The burden is on the Government to show by *preponderance of the evidence* that the property is subject to forfeiture. 18 U.S.C. § 983(c). The government must prove the appropriate *mens rea* on the part of some person regarding commission of the underlying offense. Often times the government attempts to skirt this requirement by asserting that a claimant has the burden of proof with regard to the innocent owner defense. However, this burden of establishing a defense only arises if the government can prove each element of the forfeiture offense by a preponderance. And this burden of proof exists regarding the appropriate *mens rea* ascribed to the particular underlying forfeiture offense relied upon.[16]

Corporate knowledge is deemed to exist when principals or agents of the corporation have knowledge. But, where the "agent" is acting outside the scope of his agency, such knowledge is not imputed to the corporation. *U.S. v. Once Parcel of Land Located at 7326 Highway 45 North,* 965 F.2d 311, 316 (7th Cir. 1992).

In *U.S. v. Route 2, Box 472, 136 Acres More or Less,* 60 F.3d 1523, 1527 (11th Cir. 1995), the government sought forfeiture of a farm alleging it was used to facilitate illegal drug trafficking. An officer and majority shareholder of the

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[16] For example, under 18 U.S.C. §1957(c) the offense has been described as a receiving and depositing proceeds offense. *See*: Department of Justice Summary of 1986 Act, page 14 (October 22, 1986) stating that this provision "should be utilized with caution where bona fide payments for personal services are simply being deposited into a bank. Proof of knowledge should be ostensibly clear."

corporation owning the property had cultivated marijuana on the land. The court held that no evidence showed the corporation to be anything but a legitimate company engaged in raising fish and livestock and that the shareholder's cultivation of the marijuana "took place separate and apart from the corporation, and there was no evidence that other members of the corporation were aware of it, nor that the corporation reaped any benefit from his actions, or that there was an intent to benefit the corporation." *U.S. v. Route 2, Box 472, 136 Acres More or Less,* 60 F.3d 1523, 1527 (11th Cir. 1995)[knowledge was not imputed to the corporation]. Since the government could show knowledge by the shareholder, the corporation won the action by asserting and proving the innocent owner defense. Under 18 U.S.C. §983(d)(2)(A)(i), a claimant that "did not know of the conduct giving rise to the forfeiture" may assert the innocent owner defense.

In *U.S. v. 141st Street Corporation,* 911 F.2d 870 (2nd Cir. 1990), the court upheld a government seizure of an apartment building used for drug trafficking. The court held that the building superintendent's knowledge as an agent was imputed to the apartment owner due to "substantial evidence from which the jury could have concluded" that the owner had knowledge of the illegal activities. The appellant, president of the corporation, had been contacted by authorities, spoke with tenants about drug dealers in the building, visited the building on several occasions, and spoke with his uncle the superintendent on a weekly basis.

The government bears the initial burden of proof to show that the property is subject to forfeiture. *U.S. v. $80,180 in Currency*, 303 F.3d 1182, 1184 (9th Cir. 2002).

If the government's theory of forfeiture is that the property was used to commit or facilitate the commission of a criminal offense, than it must show that there was a *substantial connection* between the property and the offense. 18 U.S.C. § 983(c)(3).

Nexus

The government must be able to establish a nexus between the property and the alleged criminal activity in order to prevail in a forfeiture action. If the theory of the forfeiture is that the property was used in facilitation or as an instrumentality, the government must show a substantial connection between the property and the alleged offense. 18 U.S.C. § 983(c)(3). If the action is proceeding on the theory that the property came from the proceeds of criminal activity, the government must be able to show that the property sought was derived from the illegal activity making the property forfeitable. *U.S. v. Edwards*, 885 F.2d 377, 390 (7th Cir. 1989).

If the property sought to be forfeited is cash, monetary instruments in bearer form, or funds in a financial institution, it is not a defense that the property involved in the offense has been removed and replaced by other, identical funds.

18 U.S.C. § 984(a)(1)(B). However, this provision is misleading because the government must trace the property to the offense and may commence a forfeiture proceeding more than one year from the date of the offense involving fungible property. And funds held in a financial institution in an interbank account is not forfeitable under (a) above unless the account holder knowingly engaged in the offense upon which the forfeiture is based. 18 U.S.C. § 984(c)(1).

Criminal Forfeiture

Criminal forfeiture actions are generally *in personam* actions filed in connection with criminal charges. As they are *in personam* actions, the government seeks the defendant's interest in the property and not the property itself. As these forfeiture actions are in conjunction with criminal charges, a conviction of the underlying criminal charge is required in order for a final order of forfeiture to be issued. *See*: Fed.R.Crim.Pro. 32.2(b)(1). If a conviction is subsequently reversed or if a defendant dies before sentencing, there can be no forfeiture of the property.

Rebuttable presumption

A rebuttable presumption exists at trial that any property of a person convicted under a Title 21 drug felony is subject to forfeiture if (1) it was acquired by such a person during the violation or "within a reasonable time" afterward, and (2) there was no likely source for such property. 21 U.S.C § 853(d). This

presumption appears to run in conflict with Rule 32.2(b)(4)'s requirement that "when a jury returns a verdict of guilty, the jury must determine whether the government has established the requisite nexus between the property and the offense committed by the defendant." Fed.R.Crim.Pro 32.2(b)(4). In order to avoid this conflict, a rebuttable presumption instruction should only be given if a reasonable jury could find the property subject to forfeiture beyond a reasonable doubt.[17]

Restraining orders

The government has the authority to seek a 10 day restraining order to hold property without notice to the defendant. However, the court must hold a hearing "at the earliest possible time and prior to the expiration of the temporary order." 21 U.S.C. § 853(e)(2). At this hearing the government must show (1) substantial probability of prevailing on the forfeiture; (2) threat that the property may be destroyed or unavailable for trial; and (3) that there is a need to preserve that property that outweighs the hardship against the owner of the property. 21 U.S.C. § 853(e). At this hearing, the prosecutor can request a 90 day restraining order, and if an indictment is filed, the restraining order will remain in effect until trial. 21 U.S.C. § 853(e). If the seizure affected the defendant's ability to retain an attorney, the hearing must be adversarial. *U.S. v. Farmer*, 274 F.3d 800 (4th Cir.

[17] For a more in-depth discussion of the conflict between Rule 32.2(b)(4) and 21 U.S.C § 853(d) see David B. Smith, *Prosecution and Defense of Forfeiture Cases*, § 14.03[1], LexisNexis, 2007.

2001); *U.S. v. E-Gold, Ltd.*, 521 F.3d 411 (D.C. Cir. 2008). One should also note that, if this becomes an issue, the prosecutor and defense counsel can agree to allow sufficient funds to be released in order for the defendant to procure counsel, but as with any other agreement with a prosecutor, this is at the prosecutor's discretion.

Pleas

Defendant and the Prosecutor can come to a plea agreement which includes a plea to the forfeiture. Additionally, a defendant can plea to the underlying criminal charge and still contest the forfeiture. *See*: *U.S. v. Cunningham*, 201 F.3d 20, 24 (1st Cir. 2000).

Remission and Mitigation

While a third party has no right to intervene in a criminal action, he can file for remission or mitigation. *See*: 21 U.S.C. § 853(i). Such a request should be filed directly with the U.S. Attorney in the district where the judicial forfeiture proceeding is brought. 28 C.F.R. § 9.4(e). In order to obtain relief, the petitioner must show (1) a legally cognizable interest in the property, and (2) the petitioner held that legal interest at the time of the violation or was a bona fide purchaser for value. 28 C.F.R. § 9.5(a)(1)(ii).

Ancillary Hearing

The purpose of an ancillary hearing is to allow third parties the opportunity to challenge the preliminary forfeiture order by establishing their right to the property. 21 U.S.C. § 853(n). Once a court enters a final order of forfeiture, the government is required to publish such an order. 21 U.S.C § 853(n)(1). A third party must assert his or her claim within 30 days of the final publication of this order, or, if the party receives notice of the order, by the deadline on the notice, and petition the court for a hearing to determine the validity of his interest. 21 U.S.C § 853(n)(2).

A party must have sufficient standing in order to go forward in an ancillary hearing. The following are persons that have generally been held to have standing: spouses, *U.S. v. Henry*, 850 F.Supp. 681 (D.C. M.D. Tenn. 1994); secured creditors, *U.S. v. Agnello*, 344 F.Supp.2d 360, 368 (E.D.N.Y., 2004); judgment creditors, *U.S. v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1191 (C.A.D.C. 1995); bailees, *U.S. v. Alcatraz-Garcia*, 79 F.3d 769, 775 (9th Cir. 1996); lien holders, *U.S. v. Timley*, 507 F.3d 1125 (8th Cir. 2007); and title owners, *U.S. v. Ida*, 14 F.Supp.2d 454 (S.D.N.Y. 1998). The following have been held to generally lack standing: defendants, 21 U.S.C. § 853(n)(2); codefendants, Fed.R.Crim.Pro. 32.2(c)(2); general creditors, *see*: *U.S. v. Watkins*, 320 F.3d 1279 (11th Cir. 2003), *see also*: *U.S. v. BCCI Holdings (Luxembourg), S.A.*, 46 F.3d

1185, 1191 (C.A.D.C. 1995); stockholders, *U.S. v. DeGregory*, 2007 WL 949804, (S.D.Fla. 2007)(citing *U.S. v*. Wyly*,* 193 F.3d 289 (5th Cir. 1999) holding that the state law of Louisiana drew a distinction between the corporations' property and the shareholders and therefore shareholders lack standing to challenge forfeiture of a corporation's property); and title owners without dominion or control, *U.S. v. Approximately $417,148.06 in U.S. Currency***,** 72 Fed.Appx. 624, 625 (9th Cir. 2003), *United States v. One Parcel of Land, Known as Lot 111-B*, 902 F.2d 1443, 1444 (9th Cir.1990).

Defense Motions

The purposes of defense motions are essentially the same as in any criminal defense case. The primary objective should be to obtain the return of the seized property. In order to achieve that goal, defense counsel should consider attacking the sufficiency and validity of the petition and subsequent pleadings, challenge the probable cause used to justify the forfeiture, and suppressing any evidence or statement obtained illegally.

Motion for appointment of counsel

Pre-CAFRA there was no provision allowing for the appointment of defense counsel in forfeiture case. It could be easily argued that this lack of defense counsel helped pave the way for the abuses previously mentioned that because such a public outrage that Congress reformed the statute and procedure. Currently,

under CAFRA, a claimant can petition the court for appointed counsel if certain conditions are met. If an attorney is appointed to represent an indigent defendant, the attorney can petition the court to represent the same client in a judicial civil forfeiture. 18 U.S.C. § 983(b)(1). Additionally, if the property subject to forfeiture is real estate which is used as the claimant's primary residence, and the claimant is financially unable to retain representation, the court should appoint counsel from the Legal Services Corporation. 18 U.S.C. § 983(b)(2)(A).

Motion for return of property

A motion for return of property pursuant to Rule 41(g) can be a powerful tool used to test the seizure itself as well as the continued retention of the property. Fed.R.Crim.Pro. 41(g).

Prior to the CAFRA, since there were no constraints on when the government should initiate a forfeiture proceeding, the Motion was used to force the government to file its forfeiture action. Now, under CAFRA, the government has deadlines by which it should initiate its proceedings. See 18 U.S.C. § 983(a)(1)(A)(i) and (iv); *See also*: 18 U.S.C. § 983(a)(3)(A). While technically unlawful for the government to seize the property and not initiate the appropriate proceedings within the statutory timeframes, it is rare that this failure by the government will result in the return of the property since all the government has to do to remedy this deficiency is to initiate the proceedings. Indeed any motion for

return of property will fail once the government initiates its action. *See*: *Shaw v. U.S.*, 981 F.2d 602 (6th Cir. 1989); *see also*: *De Almeida v. U.S.*, 459 F.3d 377, 382 (2nd Cir. 2006).

Hardship

A claimant may be entitled to "immediate release" of seized property under CAFRA's hardship provision. 18 U.S.C. § 983(f)(1). In order to establish a hardship claim, the claimant must show that he or she (1) has a possessory interest in the property; (2) has sufficient ties to the community to provide assurance that the property will be available at the time of trial; (3) continued possession of the property by the government will cause "substantial hardship" such as "preventing the functioning of a business, preventing an individual from working, or leaving an individual homeless," (4) the claimant's likely hardship outweighs the risk that the property will be lost, concealed, destroyed, damaged, or transferred during the pendency of the proceeding; and (5) the property sought to be returned is not evidence, specifically designed for illegal activities, likely to be used to commit additional criminal acts, or is currency, contraband, or a monetary instrument unless it is the asset of a legitimate business that has been seized. 18 U.S.C. § 983 (f)(1) and 18 U.S.C. § 983(f)(8).

Motion to dismiss

Rule 12(b)

While forfeiture actions are governed by the Supplemental Rules, ultimately, civil forfeiture actions are civil suits and must comply with the Federal Rules of Civil Procedure. As such, Rule 12 can be an effective tool in seeking the dismissal of the action. *See*: Supp.R. G(8)(b)(allowing for the dismissal of a forfeiture action under Fed.R.Civ.Pro. 12(b)). Rule 12(b) gives the clamant options by which he can seek dismissal of the action,[18] generally, of these, the most successful are challenges to lack of jurisdiction, Fed.R.Civ.Pro. 12(b)(1) and (2); lack of venue, Fed.R.Civ.Pro. 12(b)(3); or failure to state a claim upon which relief can be granted, Fed.R.Civ.Pro. 12(b)(6). Rule 12(b)(6) is the avenue by which to challenge the sufficiency of the government's pleadings. *See*: *U.S. v. Certain Real Property at 2323 Charms Road, Milford Twp.*, 726 F.Supp. 164 (E.D. Mich. 1989).

Pursuant to Supplemental Rule G(2), the government's complaint must (1) be verified; (2) state the grounds for subject-matter jurisdiction, *in rem* jurisdiction over the defendant property, and venue; (3) describe the property with reasonable particularity; (4) if the property is tangible, state its location when any seizure

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[18] Rule 12(b) allows for objections to be raised for (1) lack of subject-matter jurisdiction; (2) lack of personal jurisdiction; (3) improper venue; (4) insufficient process; (5) insufficient service of process; (6) failure to state a claim upon which relief can be granted; and (7) failure to properly join a party. Fed.R.Civ.Pro. 12(b).

occurred and – if different – its location when the action is filed; (5) identify the statute under which the forfeiture action is brought; and (6) state sufficiently detailed facts to support a reasonable belief that the government will be able to meet its burden of proof at trial. Supp.R. G(2). Most challenges to the sufficiency of the complaint fall into the last requirement – sufficiently stating the facts to show a reasonable belief that the government will be able to meet its burden of proof at trial. The determination of whether the government has met this requirement is largely a fact-specific determination. Counsel should be well-advised to review the complaint with exacting scrutiny to determine whether the government has met it's burden and is advised to challenge the government if it appears that the government has not meet this standard.

Supplemental Admiralty and Maritime Claims Rule C(2),[19] E(2)(a)[20] which are made applicable to forfeiture proceedings pursuant to 18 U.S.C. §981(d), require that the Government's complaint contain sufficient facts to enable Claimants to commence an investigation of the facts and to respond with some degree of particularity. *See*: *U.S. v. $38,000 in U.S. Currency*, 816 F.2d 1538, 1548 (11th Cir. 1987). The courts do not look at the knowledge that the Claimants may or

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[19] "In an action *in rem* the complaint must: (a) be verified; (b) describe with reasonable particularity the property that is the subject of the action; and (c) state that the property is within the district or will be within the district while the action is pending." Supp.R. C(2).

[20] "In actions to which this rule is applicable the complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading." Supp.R. E(2)(a).

may not have in determining sufficiency, but instead look at the face of the Complaint itself. *U.S. v. Pole No. 3172, Hopkinton*, 852 F.2d 636, 639-641 (1st Cir. 1988). In *U.S. v. $39,000 in Canadian Currency*, 801 F.2d 1210 (10th Cir. 1986), the court upheld the trial court's dismissal of a complaint which did not allege the underlying factual circumstances with sufficient particularity. In *$39,000 in Canadian Currency*, the complaint failed to specify the date, location, amount, or participants in an alleged exchange of drugs for cash.

Statute of limitations

Pursuant to 19 U.S.C. § 1621, a forfeiture action must commence within five years after the time when the alleged offense occurred or was discovered or, within two years after the time when the involvement of the property in the alleged offense was discovered, whichever is later. 19 U.S.C. § 1621. Bear in mind that an MLAT request will toll the statute of limitations for a period corresponding to the date of the request and final action on the request. It is also important to note that even if the government's action is time-barred, it does *not* mean that the property will be returned to the claimant; the claimant still has the burden of showing that he has superior title to the property and has standing to bring the suit.

For an illustration of this seemingly paradoxical issue see *U.S. v. Babb*, 54 F.Appx. 772 (4th Cir. 2003)(not designated for publication), and *Babb v. D.E.A*, 146 F.Appx. 614 (4th Cir. 2005). In the former case, the government sought the

forfeiture of $57,960 but failed to give proper notice to claimant Babb. *U.S. v. Babb*, 54 F.Appx. at 773. Once the government rectified its service of process, Babb challenged the action as being time barred. *U.S. v. Babb*, 54 F.Appx. at 773. The Fourth Circuit agreed with Babb and held that the action was time barred and remanded the case "for further proceedings not inconsistent with this opinion." *U.S. v. Babb*, 54 F.Appx. at 774. Subsequently, Babb filed a motion for return of property. *Babb v. D.E.A*, 146 F.Appx. at 618. The district court held in favor of Babb and the government appealed arguing that allowing him to have title to the funds would give him "presumptive ownership rights" in the funds. *Babb v. D.E.A*, 146 F.Appx. at 618. The Fourth Circuit held that "even when the government is foreclosed from perfecting its title to drug-related currency via forfeiture proceedings, or fails to pursue forfeiture in the first place, the government may retain the property until the claimant files an equitable action or motion and demonstrates that he is lawfully entitled to the return of the property. In response to such an action or motion, the government may still establish its ownership by demonstrating that property at issue is [property subject to forfeiture]." *Babb v. D.E.A*, 146 F.Appx. at 620.

The *Babb* cases demonstrate the reality of forfeiture practice – even when the government does not follow the procedure it is supposed to, it may still retain the property to the detriment of the owner until the owner asserts his rights. Also,

while the government suffers no real consequences for failure to comply with the applicable deadlines, a corresponding failure on the part of the claimant will virtually guarantee that the government will retain possession, if not title, to the property.

Innocent Owner Defense

A party claiming to be an owner of property sought to be forfeited yet who has not played any part in the alleged illegal activity may seek relief from forfeiture as an innocent owner under 18 U.S.C. § 983(d).

Under the code's innocent owner defense, relief can be granted if the claimant (1) did not know of the conduct giving rise to the forfeiture, 18 U.S.C. § 983(d)(2)(A)(i), *U.S. v. One Silicon Valley Bank Account, 3300355711, in the Amount of One Hundred Thirteen Thousand Nine Hundred Fifty-Two and 62/100 Dollars*, 549 F.Supp.2d 940 (W.D. Mich. 2008); or (2) upon learning of the conduct giving rise to the forfeiture, did all that reasonably could have been expected to terminate the such use of the property, 18 U.S.C. § 983(d)(2)(A)(ii), *U.S. v. Lot Numbered One of Lavaland Annex*, 256 F.3d 949 (10th Cir. 2001). As for what a person "reasonably could be expected" to do, this includes turning in the user of the property who is committing a crime or revoking or attempting to revoke permission to use the property. 18 U.S.C. § 983(d)(2)(B)(i). The burden of proof in an innocent owner's defense lies with the claimant who must demonstrate the

defense by a preponderance of the evidence. 18 U.S.C. § (d)(1); 21 U.S.C. § 853 (n)(6).

The class of owners to whom this defense is available is a relatively narrow one and has been limited by the statute to owner or interest holders or bona fide purchasers. 18 U.S.C. § 983(d)(3)(A), 21 U.S.C. § 853(n)(6). However, there is a statutory exception to the requirement that the claimant gave value if (1) the property is the claimant's primary residence; (2) depriving the claimant of the property would deprive the claimant and dependants residing in the property the means to maintain reasonable shelter in the community; (3) the property is not traceable to the proceeds of a criminal offense; and (4) the claimant obtained interest to the property through marriage, divorce, legal separation, or the claimant was the spouse or legal dependant of a person whose death resulted in the transfer of the property to the claimant through inheritance or probate. 18 U.S.C. § 983(d)(3)(B). The purpose of the relation back provision is, at least in theory, to prevent a defendant from transferring title to the property in an effort to preclude the possibility of forfeiture.

Standing

Statutory

Statutory standing refers to the requirement of ownership or legal interest in the property as outlined in the statute. In order to ensure that statutory standing is

preserved, counsel must take care to ensure that no statutory deadlines or requirements are missed. In addition, counsel must sufficiently identify the property claimed and establish the claimant's legal interest in the property. As stated above, a general creditor, a bailee when the bailor is unknown and a possessor without dominion or control do not have statutory standing to make a claim to seized property. 18 U.S. C. § 983(d)(6)(B)

The question of whether an entity has statutory standing or is an unsecured creditor is far from straightforward. When money is held in a constructive trust for a claimant, the claimant has standing as a beneficial owner of a constructive trust. *U. S. v. $4,224,958.57*, 392 F.3d 1002 (9th Cir. 2004)[post CAFRA recognition that constructive trust provides forfeiture standing]. In *$4,224,958.57,* the Ninth Circuit noted that California law recognized a constructive trust when the government would be unjustly enriched from obtaining funds repatriated from a Liechtenstein account controlled by a "fraudster." When the funds were repatriated, the government acquired it along with a constructive trust which favored the defrauded investors. *See also*: *Torres v. $36,256.80 U.S. Currency*, 25 F.3d 1154(2nd Cir. 1994)[pre-CAFRA recognition that constructive trust provides forfeiture standing].

In *U.S. v. Salam*, *Inc.,* 191 F. Supp.2d 725 (E.D. La. 2001), the government charged six companies with violations of 31 U.S.C. § 5324(b), and 18 U.S.C. §§ 2,

982, and 1341, and sought forfeiture, pursuant to 18 U.S.C. § 982 of monies in various amounts. *Salam*, 101 F.Supp.2d 725 at 726. Travelers Express Company, Inc. filed a "Claim of Owner," stating that it was the true owner of $209,915.48 in United States Currency that the government was seeking to forfeit. *Id. at 727.* The Government filed a Motion to Dismiss the claim of owner contending that Travelers lacked Article III standing because Travelers was only a general creditor of the defendant companies. *Id.* Travelers asserted that the specific funds received by the defendants through the sale of the money orders was simply a substitute for the money orders. The court held that the defendant companies were in a fiduciary relationship with Travelers, therefore Travelers had sufficient Article III standing to bring their claim.

Texas also recognizes that a constructive trust exists where one party has been unjustly enriched by a fiduciary's breach of the relationship. *Newby v. Enron,* 188 F.Supp. 684, 703 (5th Cir. 2002). The Fifth Circuit looks at three elements in order to determine whether a constructive trust exists: "a fiduciary relationship exists between [party on and party two]; which [party two] breached; and as a result, earned a profit that justice does not permit his to keep." Id. at 703. In recognizing a constructive trust, the critical requirement is that the parties have a fiduciary relationship prior to and apart from the transaction in question. This relationship may be established through familial relationships or other types of

close, confidential relationships. *In re Adobe Energy,* 82 Fed. Appx. 106, 113 (5th Cir. 2003).

In any event, such factual matters as whether a claimant has standing are disputed factual issues that require, at a minimum, an evidentiary hearing. *United States v. 1998 BMW "I" Convertible, VIN # WBABJ8324WEM20855,* 235 F.3d 397, 400 (8th Cir. 2000). In *Martin v. Morgan Drive-Away*, 665 F.2d 598 (5th Cir. 1982) the district court dismissed the plaintiff's complaint against the defendants. The Fifth Circuit held that "the trial court erred in not holding an evidentiary hearing on the issue of [the plaintiff's] standing to prosecute the action . . . the plaintiff's] standing or its absence is based upon several issues of fact. Thus a summary disposition of the type made by the trial court was inappropriate." *Martin*, 665 F.2d 598 at 602.

<u>Jurisdictional standing</u>

In order to satisfy the case or controversy requirement of Article III of the Constitution, a claimant must have a cognizable interest in the property claimed. The claimant bears the burden at all stages of litigation of establishing jurisdictional standing and the burden of proof changes as the litigation progresses. In the initial pleading stage, a claimant will satisfy this burden by simply alleging a sufficient interest in the seized property (*discussed supra*). Once the litigation moves to the summary judgment stage, the claimant must prove by a

preponderance of the evidence that he has a facially colorable interest in the property such that he would be injured if the property were forfeited; a claimant need not definitively prove the existence of that interest at this stage. *See*: *Rodriguez-Aguirre,* 264 F.3d at 1206 and 1204 (10th Cir. 2001); *United States v. Cambio Exacto, S.A.,* 166 F.3d 522, 527-28 (2d Cir.1999); *United States v. $577,933.89, More or Less, in U.S. Funds,* 287 F.3d 66, 79 (2d Cir.2002) ("[T]he only question that the courts need assess regarding a claimant's standing is whether he or she has shown the required 'facially colorable interest,' not whether he ultimately proves the existence of that interest."

Once the case proceeds to trial, the claimant will have to establish standing sufficient to satisfy the court. This finding is made not by a jury, but is a jurisdictional question to be made by the judge. *United States v. Cambio Exacto, S.A.,* 166 F.3d 522, 526 (2nd Cir. 1999). While there is no bright-line rule defining what the court will ultimately require to establish adequate standing to pursue a claim, the courts have pronounced factors that will be considered in making this determination. Among these factors which are evidence of ownership, *U.S. v. $148,840.00 in U.S. Currency*, 521 F.3d 1268 (10th Cir. 2008); possession of the property, *U.S. v. $515,060.42 in U.S. Currency*, 152 F.3d 491, 498 (6th Cir. 1998); legal title, *U.S. v. One 1945 Douglas C-54 (DC-4) Aircraft, Serial No. 22186*, 604 F.2d 27, 29 (8th Cir. 1979); financial or personal stake, *U.S. v. One Lincoln*

Navigator 1998, 238 F.3d 1011, 1013 (8th Cir. 2003); or whether the claimant stands to suffer direct injury, *United States v. Cambio Exacto, S.A.,* 166 F.3d 522, 527 (2nd Cir. 1999).

Classification of Claimant

How a claimant is classified can be of great consequence. Oftentimes, it is the classification of the claimant will determine whether jurisdictional standing exists. The following classifications have been found to generally have standing: mortgage of lien holders, record title holders, assignees, trust beneficiaries, bankruptcy trustees, executors. The courts have also generally held that the following *do not* have standing: general unsecured creditors, bailees, a straw owner. The following *may* have standing depending on the totality of the circumstances: curriers in mere possession; shareholders; finders of property; judgment creditors; possessors of a marital interest. *See*: s*upra*.

In making the determination as to the classification of the property in relation to the claimant the court will turn to state law. *U.S. v. Lester*, 85 F.3d 1409, 1412 (9th Cir. 1996).

Fugitive Disentitlement

Prior to the Supreme Court's decision in *Degen v. U.S.*, 517 U.S. 820 (1996), the circuits had split over whether a fugitive in a pending criminal action was barred from pursing a claim in a civil proceeding. *See*: *U.S. v.* Eng, 951 F.2d

461, (2nd Cir. 1991)(holding that fugitive disentitlement barred a claimant from pursuing a forfeiture defense); *but also see*: *U.S. v. $40,877.59 in U.S. Currency*, 32 F.3d 1151 (7th Cir. 1994)(holding fugitive disentitlement did not preclude a fugitive from pursuing a forfeiture claim). In *Degen*, a unanimous Court relied on due process considerations in holding that a fugitive in a criminal proceeding is not barred from filing a claim in a civil forfeiture proceeding. However, CAFRA effectively overruled this decision by prohibiting a fugitive from utilizing any federal judicial resources – including contesting a judicial forfeiture. 28 U.S.C. §2466.

Conclusion

Thus, while most government lawyers too quickly conclude that no claimants should prevail in any case in which property has been seized for forfeiture, it is not a foregone conclusion. Your client will often walk a tight rope over whether, in the context of a civil forfeiture, they can expect an indictment. And even though this litigation is not for the faint at heart, you can win and win big.